Supreme Court, U.S.
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No. 98-1267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARY G. KERGER,

Petitioner,

v.

BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 502, COUNTY OF DUPAGE AND STATE OF ILLINOIS, a/k/a COLLEGE OF DUPAGE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is there a substantial question of federal law or the United States Constitution when a state Court of Appeals strikes footnotes and reproduced copies of the statute and record from Petitioner's Appellate Court Brief for Petitioner's failure to comply with that State's Supreme Court rules regarding appellate briefs and where the State Supreme Court denied Petitioner's Petition for Leave to Appeal.

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STATEMENT OF THE CASE

A. Facts of the Case

Respondent is a community college operating in DuPage, Cook and Will Counties, Illinois (C. 347, ¶ 2). Petitioner was hired on either an annual or quarterly basis for three consecutive years as a temporary replacement for full-time faculty members of the College who had either taken a leave or died. (C. 454). Petitioner was so employed from the beginning of the 1993-94 school year through June 11, 1996. (C. 348, ¶ 5; C. 422).

On January 17, 1996, Respondent transmitted to Petitioner a Notice of Dismissal. (C. 348, ¶ 6; C. 422). Respondent advised Petitioner, through this notice, that she was being dismissed effective June 11, 1996. (C. 422).

Petitioner, while an employee of the Respondent, was covered by the Collective Bargaining Agreement (the "Agreement") between the Board of Trustees and the College of DuPage Faculty Association IEA/NEA (the "Association"). (C. 347, 348, ¶ 3; C. 358-421). Petitioner, after being notified of her dismissal, filed a grievance pursuant to Section E1 of the Agreement. (C. 385). At Step 2 of the grievance process, Petitioner demanded that a court reporter be allowed to attend the meeting and make a stenographic record of such meeting. (C. 2, ¶ 13). Petitioner alleged that the Agreement's provision allowed her to have a court reporter present at her grievance meeting to act as an advisor/observer. (C. 2, ¶ 9). When the Respondent's representative declined to conduct the grievance hearing in the presence of a court reporter, asserting that the Agreement did not allow for court reporters, Petitioner unilaterally canceled the meeting. (C. 2, ¶¶ 14, 15; C. 132). Thereafter, Petitioner initiated litigation. (C. 1).

B. Procedural History of the Case

Petitioner's initial complaint, filed with the Circuit Court on March 27, 1996, alleged that she was entitled to a court reporter at her Step 2 Grievance with College officials and sought an injunction ordering Respondent to allow a court reporter at the Step 2 Grievance meeting. (C. 1). Respondent filed a motion to dismiss based upon the Court's lack of subject matter jurisdiction. (C. 97-108). On July 22, 1996 the Circuit Court granted Respondent's motion to dismiss Petitioner's complaint, but granted Petitioner leave to file an amended complaint. (C. 15).

Petitioner filed an amended complaint on September 3, 1996 seeking a declaratory right to continued employment and tenure pursuant to the Illinois Community College Act, 110 ILCS 805/3B-1, *et seq*. Petitioner's amended complaint asserted that Respondent did not have sufficient basis under the Community College Act to dismiss her because her dismissal was not based on performance or financial exigency. (C. 347-422).

Respondent filed a motion to dismiss the amended complaint for failure to state a cause of action. (C. 425-435). The Circuit Court after a hearing on the motion dismissed Petitioner's amended complaint on September 26, 1996. While acknowledging that Respondent had not complied with every aspect of the Community College Act the Circuit Court held that Respondent acted within its common-law authority to terminate employees. Petitioner's subsequent motion for rehearing and summary judgment were denied by the Circuit Court on November 13, 1996. (C. 495).

On November 21, 1996, Petitioner filed a notice of appeal with the Illinois Court of Appeals, Second Judicial District ("Appeals Court"). (C. 497). Petitioner's Appellate Brief asserted that the Circuit Court's dismissal of her amended complaint was in error because Respondent had not complied with the Community College Act. (Petitioner's Appx. A). On October 17, 1997 the Appeals' Court, after reviewing the fully briefed appeal, issued an initial decision affirming the Circuit Court's decision. (App. 4-14).[1] The Appeals Court held that the Respondent had dismissed Petitioner in accordance with 110 ILCS 805/3B-3 of the Community College Act. The Appeals Court further held that even if the dismissal did not fully comport with the statute, the Community College Act did not eliminate a board's common-law authority to dismiss non-tenured teachers. (*Id.*) Additionally, the Appeals Court's initial decision struck from Petitioner's brief all footnotes and reduced statutory quotations within the brief as violative of Illinois Supreme Court Rule 341. (*Id.*)

On November 7, 1997 Petitioner filed a petition for rehearing. Petitioner's petition for rehearing alleged that the court's decision was wrong and that Illinois Supreme Court Rule 352(a) was violated. Petitioner also filed with the Appeals Court and the Illinois Supreme Court a document titled "Report of Violation of Code of Judicial Conduct Raising Question of Fitness for Office and Illinois Supreme Court Rule 361 and 63c Motion to Disqualify". (App. 64-84). The Report of Violation sought to disqualify Appellate Justice Susan Hutchinson, the author of the opinion, for having exhibited bias and/or prejudice against Petitioner

1. This initial opinion stated as follows: "The text of this opinion may be changed or corrected prior to the time of filing of Petition For Rehearing or the disposition of the same".

and/or her counsel by striking from her brief footnotes and reproduced copies of various statutes in violation of Illinois Supreme Court Rule 341. (*Id.*)

On December 4, 1997 the Appeals Court issued a revised opinion replacing its October 17, 1997 opinion. (App. 20-30). The new opinion still upheld the Circuit Court's dismissal of Petitioner's complaint because of the unlimited common law authority provided community college boards to dismiss non-tenured teachers pursuant to the Community College Act. However, this opinion determined that the Respondent had not dismissed Petitioner in accordance with 805/3B-3. The opinion also struck the footnotes contained in Respondent's Appellee Brief as violative of Illinois Supreme Court Rule 341(a) (*Id.*) Petitioner filed a second petition for rehearing with the Court of Appeals on December 18, 1997 which was denied on February 4, 1998.

On February 25, 1998 Petitioner filed a Petition for Appeal as a Matter of Right or in the Alternative Leave to Appeal with the Illinois Supreme Court. Petitioner asserted that the striking of certain portions of her Appellate Brief by the Court of Appeals violated due process of law. On June 3, 1998 the Illinois Supreme Court denied Petitioner's appeal without comment. (App 1-2).

Petitioner initially attempted to file her Writ of Certiorari with this Court on December 8, 1998. Petitioner's Writ was rejected by this Court on or about December 8, 1998 for failing to comply with the Rules of the Supreme Court. On February 8, 1998 Petitioner's corrected Petition for Certiorari was filed.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI WHEN NO SUBSTANTIAL ISSUE OF FEDERAL LAW OR THE UNITED STATES CONSTITUTION EXISTS.

Petitioner asserts that the Illinois Appellate Court's decision to strike footnotes and reduced statutory quotations, from her Appellate Brief for violating Illinois Supreme Court Rule 341 violated her constitutional rights "guaranteed by the 14th Amendment to the U.S. Constitution". Petitioner's attempt to "constitutionalize" her unhappiness and dissatisfaction with the Court of Appeals' and Illinois Supreme Court's decisions is without merit.

It is uncontroverted that this Court does not have jurisdiction to grant a Writ of Certiorari where there is no substance or merit to any substantial question or federal constitutional claim.

> A party may assert a right, title, privilege, or immunity without even color for such assertion, and if that were alone sufficient to give this Court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage.

Iowa v. Rood, 187 U.S. 87, 23 S. Ct. 49, 51 (1902). The mere fact that Petitioner asserts a clause of the Constitution as being violated is not in itself sufficient unless there is a plausible foundation for such claim. "A real, and not a fictitious federal

question is essential to the jurisdiction of this Court of the judgments of state courts". *Sawyer v. Piper*, 189 U.S. 154, 23 S. Ct. 633, 634 (1903).

In relevant part Illinois Supreme Court Rule 341(a) provides that an appellee's brief shall be limited to . . . "75 pages if not printed . . ." It further provides that "footnotes, if any, shall be used sparingly". (App. 42). Illinois appellate courts have consistently stated that "[t]hese rules are not merely suggestions . . . and it is within our discretion to strike [a party's] briefs and dismiss the appeal based on violations of these rules". *Geers v. Brichta*, 248 Ill. App. 3d 398, 618 N.E.2d 531, 533 (1st Dist. 1993), citing *Marengo v. Loffelmacher*, 236 Ill. App. 3d 690, 603 N.E.2d 80 (1992). The *Geers* court stated that

> we struck defendant's original brief for violations of Supreme Court Rule 341(a) . . . which limits briefs to 75 pages and provides that neither narrow margins nor any other device shall be employed to evade the page limitation.

Id.

Petitioner's Appellant Brief, as noted by the Court of Appeals, utilized photocopied reproduction of statutes and pages from the record of proceedings "in a greatly reduced, dual-column format". (App. 8 and App. 24). The Court determined that Petitioner had apparently done so to "evade" the 75 page limitation. The Court of Appeals also noted Petitioner utilized numerous footnotes in their briefs which contained arguments in violation of Rule 341's admonition that footnotes be used sparingly.[2]

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2. The Court of Appeals also struck all footnotes from Respondent's Appellee Brief in its revised opinion. (App. 24).

This Court has held that matters involving the alleged erroneous construction of a state's statute by the state's supreme court does not rise to a denial of due process guaranteed by the Fourteenth Amendment. *Neblet v. Carpenter, et al.*, 350 U.S. 297, 302, 59 S. Ct. 170 (1938). "We are, therefore, without jurisdiction to review the state court's decision of any of these questions". *Id.* Similarly, in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370 (1909), it was held that a state court did not violate the due process clause of the Fourteenth Amendment when striking defendant's answer and entering a default judgment for failure to comply with a pre-trial order. Additionally, this Court has held the

> [t]he expression of legal rights is often subject to certain procedural rules: the failure to follow those rules may result in a curtailment of the right . . . but the mere use of procedural rules does not, in itself, violate the defendant's due process rights.

See Insurance Corp. v. Compagine Des Bauxites, 456 U.S. 694, 102 S. Ct. 2099 (1982) (Court rejected petitioner's claim that imposition of sanctions for failure to comply with a discovery order violated due process of law).

In the instant case, Petitioner brought her claim that the Court of Appeals striking of her footnotes and copies of statutes in her appellate brief violated the Supreme Court Rules. The Illinois Supreme Court is certainly empowered to interpret its own rules. It did so in the instant case and rejected Petitioner's claim of a due process violation. As such, this Court, consistent with the cases set forth herein, does not have jurisdiction over this matter.

II.

THE CASES CITED BY PETITIONER IN NO WAY SUPPORT HER CLAIM OF DUE PROCESS VIOLATION.

Moreover, Petitioner's Petition for Writ of Certiorari fails to cite any case supportive of her contention. The few cases cited by Petitioner do not support her claim that striking of footnotes and reproduced statutes from her Appellant Brief violated her constitutional right to due process: *Wisconsin v. Constantineau*, 400 U.S. 433, 473, 91 S. Ct. 507 (1971). The Court struck down a Wisconsin statute that allowed individuals to post the names of persons who are excessive drinkers and prevent such persons from purchasing or receiving alcohol. The Court held that

> where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential;

Veillon v. Exploration Services, Inc., 876 F.2d 1197 (5th Cir. 1989) (Court of Appeals ruled that the imposition of sanctions involving a $750 fine under Rule 11 of the Federal Code of Civil Procedure did not violate counsel's due process. While notice and an opportunity to be heard are required before a deprivation of property occurs, notice may come in many shapes, including the Rule itself); *Barnett v. County of Cook*, 388 Ill. 251 (1944) (taxpayer challenged the constitutional validity of a county taxing statute. The court ruled that the statute failed to provide adequate notice before levying a tax on a person's property).

The case cited by Petitioner involves due process relating to actual loss of property, *i.e.*, a fine or tax. It is clear that none of the cases cited by Petitioner address Illinois Supreme Court Rule 341 and clearly none relate to whether or not due process is violated by striking of a party's footnotes or reproduced statutes in a brief. As such, these cases are wholly unsupportive of Petitioner's Writ.

III.

THE COURT OF APPEALS DID NOT DISREGARD OR REFUSE TO ADDRESS PETITIONER'S ARGUMENTS.

Petitioner also asserts that her due process rights were denied because the Court of Appeals refused to acknowledge and address her arguments. Again, Petitioner's assertions are baseless. The Court of Appeals fully addressed the arguments set forth by the Petitioner in her initial brief and her reply brief. While the Court of Appeals struck the parties footnotes and copies of statutes contained in Petitioner's Brief, it did not, as Petitioner would like this Court to believe, strike any of her claims or arguments.

The Court of Appeals' decision clearly reveals the careful consideration and analysis given to the parties arguments and interpretation of the relevant statute, the Illinois Community College Act. The fact that the Court of Appeals struck Petitioner's (and Respondent's) footnotes and copies of various statutes reproduced in Petitioner's brief does not in any way mean that Petitioner's arguments were not considered. In fact, the section of the Statute, 805/3B-2, upon which now Petitioner appears to rest her claim, was struck by the Court of Appeals as reproduced and copied in Petitioner's brief, but the arguments made by both parties

regarding the statute were not. In fact, Respondent reproduced this section of the statute in its Appellee Brief for the Court's consideration. While Petitioner may dislike and disagree with the resolution of her arguments and claims by the Court of Appeals and the Illinois Supreme Court, she cannot, with any merit, assert that her arguments were not addressed and considered.

IV.

RULINGS ADVERSE TO PETITIONER'S CLAIMS DO NOT CONSTITUTE BIAS ON THE PART OF THE COURT.

Petitioner also asserts that the Court of Appeals violated Illinois Supreme Court Rule 63(c). In relevant part, Rule 63(c) requires a judge to disqualify herself from a case if she has actual or perceived bias. Petitioner raised a claim of bias with the Illinois Supreme Court. The Illinois Supreme Court denied the claim without comment.

Once again, Petitioner is urging this Court to review issues of interpretation and construction of statutes by the state's highest court. As asserted earlier herein, this Court must decline such invitation. *See Neblet v. Carpenter, et al., supra.*

Moreover, Petitioner's claim of bias by Justice Hutchinson is meritless. The only basis asserted for this claim is the Court's opinion adverse to Petitioner. "The entry of an adverse judgment, standing alone, is not evidence of prejudice". *People v. Hall*, 157 Ill. 2d 324, 335, 626 N.E.2d 131 (1993). If Petitioner's claim were true, every party who lost a case, or who was reprimanded by the Court could claim a violation of Rule 63(c). Such an interpretation is preposterous.

CONCLUSION

Based on the foregoing arguments and authorities, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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